86 1776

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DONALD GAGNE, ADMINISTRATOR OF THE ESTATE OF JAMES D. GAGNE AND ARTHUR AND PAULINE GAGNE, INDIVIDUALLY AND AS NEXT FRIEND OF CHRISTINE GAGNE, A MINOR CHILD,

PETITIONERS

VS.

MIKE PUTNAL,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

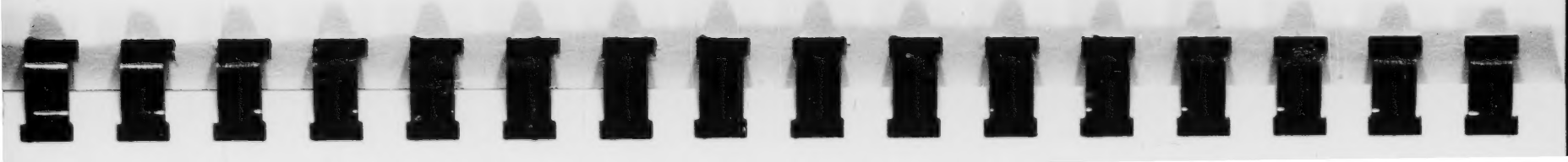
BROWN, TODD, HAGOOD
and DAVENPORT
Ervin A. Apffel, III
1600 East Highway 6,
Suite 418
Alvin, Texas 77511
713/331-4441

ATTORNEYS FOR
PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

(1) Did the Fifth Circuit err in concluding that the rule of the Galveston City Jail requiring the removal of belts from detainees and other prisoners was "discretionary" in the sense of a qualified immunity claim for acts or omissions that occur in the course of a police officer's official duties?

(2) Did the Fifth Circuit err in concluding that the arresting officer was "not" under a clearly established constitutional duty to discover a prisoner's suicidal tendencies or to deprive a prisoner of the means of killing himself?



LIST OF PARTIES

Pursuant to Rule 21.1(b), counsel for Petitioners certifies that the following is a completed list of all parties:

1. Mike Putnal

2. Donald Gagne, Administrator of the Estate of James D. Gagne

3. Arthur and Pauline Gagne, Individually and as Next Friend of Christine Gagne, A Minor Child

4. City of Galveston, Texas

5. Barry Abrams and Harvey G. Brown, Jr., Sewell & Riggs, Attorneys for Respondent, Mike Putnal

6. Ervin A. Apffel, III, Brown, Todd, Hagood & Davenport, Attorneys for Petitioners Donald Gagne, Administrator of the Estate of Arthur and Pauline Gagne, Individually and As Next Friend of Christine Gagne, A Minor Child

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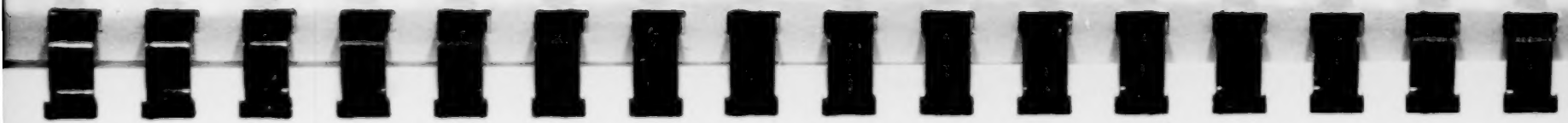

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IN THE
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DONALD GAGNE, ADMINISTRATOR OF THE ESTATE OF JAMES D. GAGNE AND ARTHUR AND PAULINE GAGNE, INDIVIDUALLY AND AS FRIEND OF CHRISTINE GAGNE, A MINOR CHILD,

PETITIONERS

VS.

MIKE PUTNAL,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE UNITED STATES SUPREME COURT:

COME NOW Petitioners and seek Writ of Certiorari to the Fifth Circuit's December 9, 1986 judgment and pray that same issue in these regards.

OPINIONS BELOW

The Fifth Circuit Opinion is reported at 805 F.2d 558 (5th Cir. 1986) as attached in Appendix A. The District Court's order denying Officer Putnal's Motion to Dismiss is attached as Appendix B.

JURISDICTION

Petitioners invoke jurisdiction via 28 U.S.C.A. §1254(1). The Fifth Circuit's judgment was entered on December 9, 1986.

FEDERAL STATUTES AND RULES

42 U.S.C.A. §1983

United States Constitution, Fifth Amendment.

United States Constitution, Eighth Amendment.

United States Constitution, Fourteenth Amendment.

STATEMENT OF THE CASE

On or about May 17, 1983, at approximately 3:00 a.m., two uniformed Galveston Police offices, believed to have been SGT. RICE and OFFICER PUTNAL, one of the

Respondents herein, arrested JAMES D. GAGNE ("Deceased"), son of Petitioners ARTHUR and PAULINE GAGNE and the father of CHRISTINE GAGNE, who at the time of her father's death was a thirteen year old minor child. In connection with CHRISTINE GAGNE, her father, JAMES D. GAGNE, deceased, was her sole means of support, care, guidance, comfort, and companionship. Gagne was arrested for public intoxication and trespassing. He was transported to the Galveston City Jail and "booked" at approximately 3:10 a.m.

Gagne was obviously intoxicated. He also had scars on his wrist from a prior, unsuccessful suicide attempt. Had he been appropriately screened and searched, this would have been discovered. Since, however, there was no such screening, Gagne was placed into the regular jail population and a regular cell.

During the booking process, Gagne's belt was not removed from him prior to his being placed into the jail cell. Neither was he placed under a heightened surveillance, as his state of intoxication and prior attempts at suicide would entitle him to have.

Gagne was last seen alive by city police officers at approximately 4:30 a.m. The next time the cell was visually checked (at or about 6:55 a.m.), officers were summoned by Gagne's cell-mate, who shouted and banged on the cell to attract the officer's attention. Gagne's time of death in the Galveston City Jail was placed at 5:00 a.m., during the approximate two and one-half hours he was in custody but not under observation. His death by hanging was accomplished with the belt, which Officer Putnal failed to remove during the booking process.

In Petitioners' First Amended Original Petition, Petitioners contended that "Putnal" acted under color of state law, and that his acts and/or omissions breached various Constitutional, Statutory and/or Common Law duties owing to the deceased, James D. Gagne by virtue of his being taken into custody, that these acts or omissions were pursuant to or in conformity with policies, practices, or customs existing within the police department, or other city management, and/or ratified by the city management. It was also alleged that each of the acts and/or omissions was the proximate and/or producing cause of the damages sought by way of the lawsuit.

Petitioners additionally contended that: (1) the City of Galveston and Officer Putnal had a duty to exercise reasonable care in the safekeeping of the deceased while he was in police custody,

said duty being even higher since they knew or should have known of his intoxicated state and suicidal tendencies, which will be discussed further herein; (2) the City of Galveston and Officer Putnal knew that the deceased, James D. Gagne, was intoxicated and unable to exercise reasonable care for his own safety; (3) as a result of the state of intoxication of the deceased and his prior suicidal tendencies, the City of Galveston and Officer Putnal should have placed deceased under "heightened surveillance" and "close observation"; (4) the City of Galveston and Officer Putnal failed to remove the deceased's belt prior to his being placed in a jail cell; and (5) the City of Galveston and Office Putnal were guilty of acts and omissions which constituted negligence.

In Petitioners' Second Amended Original Complaint, Petitioners included

the allegation that Officer Putnal could not successfully maintain the defense of immunity in this action for the reason that his actions on the occasion in question were such that the suicide which was the result of such actions would be the likely result, and hence be "known" to occur from a failure on the part of Officer Putnal to remove said belt. Furthermore, such actions on the part of Officer Putnal amounted to more than mere negligence and rose to the level of deliberate indifference for the rights and well-being of the deceased, James D. Gagne.

Officer Putnal raised the qualified immunity defense in his answer by asserting as an affirmative defense that all of his conduct occurred in his official capacity as a police officer, all of his actions were justified by a reasonable belief that they were lawful and that he

at all times had engaged in a good faith effort to discharge his duties as a police officer.

Appeal was taken to the Fifth Circuit to review the District Court's order based on 28 U.S.C.A. §1291.

Suit was orignally filed in the District Court under 28 U.S.C.A. §1343, 42 U.S.C.A. §1983 and §1988, the United States Constitution, and also the Court's pendant jurisdiction.

GROUNDS FOR GRANTING THE WRIT

Pursuant to Rule 17, there are special and important grounds for granting the Writ of Certiorari:

(1) The Fifth Circuit's holding conflicts with the rationale and holding of this Court in Davis vs. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed. 2nd 139 (1984).

(2) The Fifth Circuit's holding conflicts with its own holdings of Elliott vs. Perez, 751 F.2d 1472 (5th Cir. 1985) and Dennis vs. Warren, 779 F.2d 245 (5th Cir. 1985).

ARGUMENT AND AUTHORITIES

I.

Petitioners respectfully submit to this Court that they have met their burden of pleading with particularity of all material facts which support their contention that a plea of qualified immunity cannot be maintained by Officer Putnal. Elliott vs. Perez, 751 F.2d 1472 (5th Cir. 1985). Petitioners have not only pleaded a duty on the part of the City of Galveston and Officer Putnal to exercise reasonable care in providing for the safe incarceration of Gagne, but also that it is customary, traditional, and good police practice to remove an arrestee's belt prior to his being placed in jail. The reason for this mandate is obviously to protect an arrestee from himself, and also to remove a potential weapon that could be used against other inmates and/or custodial personnel. This "customary,

traditional, and good police practice" to remove an arrestee's belt prior to being placed in jail was allegedly incorporated into the policies and procedures of the Galveston City jail. In other words, it was a mandate and/or rule of the City of Galveston Police Department that "all belts must (emphasis added) be removed from prisoner's clothing...".

Petitioners acknowledge and agree with Saldana vs. Garza, 684 F.2d 1159, 1163, n.12 (5th Cir. 1982), wherein the Fifth Circuit has stated that it is well established that police officers fall within one of the categories of public officials whose positions entail the exercise of discretion permitting them to assert a qualified immunity from personal liability in a damages action brought pursuant to 42 U.S.C.A. §1983. Additionally, Petitioners acknowledge that Harlow vs. Fitzgerald, 457 U.S. 800, 102 S. Ct.

2727, 73 L. Ed. 2d 396 (1982) holds that the qualified immunity defense protects a public official performing a discretionary function from liability for civil damages so long as his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, supra at 818. However, Petitioners respectfully point out to this Court that during the booking process, Officer Putnal did not "fail" in regard to any discretionary authority he enjoyed as a police officer with the City of Galveston. Officer Putnal's failure was evidenced on the occasion in question through his neglect, ignorance, and "deliberately indifferent" attitude toward not only customary and good police practice, but also a specific, straight-forward and unambiguous departmental policy and/or

rule of the City of Galveston Police Department.

Accordingly, the District Court in this case did not err by concluding that the failure of Officer Putnal to follow a customary practice of removing a pre-trial detainee's belt during the booking process was not an exercise of discretion that could be protected by a qualified immunity. There is no "discretion" or "good faith" at issue in connection with the actions of Officer Putnal on the occasion in question. The Fifth Circuit's nolding therefore conflicts with the rationale and holding of the United States Supreme Court in Davis vs. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984), where it held that officials who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was

unreasonable. In light of the facts that James D. Gagne, deceased, was intoxicated at the time of his arrest, booking, and incarceration, and had prior suicidal tendencies which should have been known to Officer Putnal, Putnal's failure to remove Gagne's belt was nothing less than unreasonable conduct.

Davis, supra at 147.

Finally, although Respondent has made repeated reference to the District Court's express acknowledgment that the applicable law regarding the duty to divert jail suicides was and is unsettled in the Fifth Circuit, the fact of the matter is that Officer Putnal violated a "clearly established" mandate of the City of Galveston Police Department, and as such, should not be entitled to qualified immunity from suit.

II.

In the case at bar, Petititoners have pleaded facts, and not a mere conclusive allegation as Respondent Putnal contended before the Fifth Circuit. The fact of the matter at issue is Putnal's failure to remove the belt of Gagne prior to Gagne's being placed in a detention cell. Petitioners submit that a reasonable police officer could not have believed Officer Putnal's acts in failing to remove Gagne's belt were permissible. Dennis vs. Warren, 779 F.2d 245 (5th Cir. 1985). Officer Putnal's acts were unreasonable in that they ultimately lead to the death of Gagne. The conclusion of whether or not such act was negligence, gross negligence, conscious indifference, or a violation of Plaintiff's rights, is to be determined by the jury which will hear this case in the District Court. The Fifth Circuit requires under the mandate of Elliott vs.

Perez, 751 F.2d 1472 (5th Cir. 1985), that a Petitioner allege with particularity all material facts which support his contention that a plea of immunity cannot be maintained. Petitioners have alleged and pleaded with particularity the material fact of failure to remove Gagne's belt.

Because this case involves the review of a ruling on a Motion to Dismiss under Rule 12(b)(6), the allegations of Petitioners pleadings in the District Court must be taken as true and must be viewed in the light most favorable to Petitioners. Scheuer vs. Rhodes, 416 U.S. 232,236 (1974); Jamieson vs. Shaw, 772 F.2d 1205, 1207 n. 1 (5th Cir. 1985). In taking Petitioners' pleadings as true, Respondent must concede that the act of Officer Putnal in failing to remove Gagne's belt prior to his being placed in a detention cell was "unreasonable" in light of the following:

1. Gagne's obvious state of intoxication (intoxicated at the level of .20 grams percent).

2. Gagne's prior suicidal tendencies as were evidenced by scars on his wrist from a prior, unsuccessful suicide attempt.

Davis vs. Scherer, supra.

Gagne was arrested for the offense of public intoxication. The Texas Penal Code defines the offense of public intoxication as intoxication "to the degree ... [the arrested party] may endanger himself or another". Tex. Penal Code Ann. §42.08(a) (Vernon 1974). The very act of arresting Gagne for public intoxication is at least an admission by Respondent that Gagne was a potential danger to himself. By admitting this fact, any shape, form or fashion of "discretion" is literally destroyed in connection with the decision making process of whether or not to remove Gagne's belt prior to incarceration. Not only was removal of the belt a specific,

straight-forward and unambiguous policy and rule of the City of Galveston Police Department, but it was also clearly the thing to do in light of Gagne's intoxicated condition even if discretion was admittedly a part of the decision making process.

In this connection, Petitioners do not take issue with the fact that it is now well settled that a police officer falls within one of the categories of public officers whose positions entail the exercise of discretion permitting them to assert a qualified immunity from personal liability in a damages action brought pursuant to 42 U.S.C.A. §1983. Saldana vs. Garza, 684 F.2d 1159, 1163, n. 12 (5th Cir. 1982); Procunier vs. Navarette, 434 U.S. 555, 561 (1978). Respondent Putnal further has asserted that this qualified immunity defense is available to police officers because their decisions are often

made "in an atmosphere of confusion, ambiguity, and swiftly moving events" and because they therefore "may err." Scheuer vs. Rhodes, 416 U.S. 232, 242, 247. In response to Respondent Putnal's contentions, Petitioners would submit that at the time Officer Putnal failed to remove Gagne's belt, Officer Putnal was engaged in the booking process. This was not a situation or "an atmosphere of confusion, ambiguity, and swiftly moving events" which necessitated a "judgment call" on the part of Officer Putnal. Scheuer vs. Rhodes, supra. Furthermore, during the booking process, Officer Putnal was not "subject to a plethora of rules... which were so voluminous and ambiguous and contrary, and in such a state of flux that ... [he could] comply with them only selectively." Davis vs. Scherer, 468 U.S. 183, 82 L. Ed. 2d at 151. As is pointed out below, Officer Putnal was charged with

the duty of recognizing and then carrying out only one rule of the City of Galveston Police Department, and that rule was explicit, clear, straight-forward and unambiguous.

"Discretion" is defined as "permission given to an individual to make decisions by his own judgment." Webster's New Collegiate Dictionary, G & C Merrimam Company, Springfield, Massachusetts, 1973, p. 326. "Discretion" has also been used interchangeably with the following terms and phrases:

a. "Free decision";

b. "Free will";

c. "Freedom of choice";

d. "Liberty of judgment".

William C. Burton, Legal Thesaurus Regular Edition, MacMillian Publishing Co., Inc., New York, New York, 1980, pp. 171-172.

In connection with whether or not Officer Putnal was acting within his

discretionary authority as a police officer with the City of Galveston Police Department on the occasion in question, and in failing to remove Gagne's belt prior to Gagne being placed in a detention cell, Petitioners would respectfully direct this Court's attention to the fact that following this "dereliction of duty," Officer Putnal was temporarily suspended from his duties as a police officer for a period of ten (10) days, without pay, for violating the rules and regulations of the Police Department of the City of Galveston. The rule which Officer Putnal was guilty of violating was as follows:

> "Belts must be removed from prisoner's clothing and placed in the property bag."

Petitioners would submit that based on this rule and/or policy, Officer Putnal had no discretionary authority, or "free decision," or "free will," or "freedom of choice," or "liberty of judgment" insofar

as the rule was applicable. Officer Putnal was not given the latitude in his decision making process to "choose as he saw fit" regarding removal of Gagne's belt prior to Gagne being placed in the detention cell. The rule did not give Officer Putnal permission to make a decision based on his own judgment. The rule stated clearly and unambiguously that he was to remove the belt!

III.

In connection with the case of Mitchell vs. Forsythe, 472 U.S. ____, 86 L. Ed. 2d 411 (1985), concerning the objective standard to be used in determining the qualified immunity defense issue, Petitioners would submit that it is well settled that when a person is placed into jail (police custody), the custodian has the duty to exercise reasonable and ordinary care for the protection of the prisoner's life and health. Falkenstein

vs. City of Bismark, 268 NW2d 787 (ND 1978); Thomas vs. Williams, 124 SE2d 409 (Ga.App. -1962); Porter vs. Cook County, 355 NE2d 561 (Ill.App. -1976); Warner vs. Kiowa County Hospital Authority, 551 P2d 1179 (Okla.App. -1976); Annot., 79 ALR3d 1210 §2a; Annot., 14 ALR2d 353; 60 Am.J.2d Penal and Correctional Institutions §17; RESTATEMENT OF TORTS 2d §§ 314A, 295A, 286. Texas follows this general rule. Browning vs. Graves, 152 SW2d 515 (Tex.Civ.App. - Fort Worth 1941, writ ref'd); Miller vs. Jones, 534 F.2d 1178 (5th Cir. 1976, using Texas law). Indeed, this is the majority rule. Annot., 14 ALR2d, supra.

As set out in an often-cited federal case:

> If the law imposes a duty of care in respect of animals and goods which...[a police officer] has taken into his possession by virtue of his office, why should not the law impose the duty of care upon him in respect of

> human beings who are in custody by virtue of his office? Is a helpless prisoner in the custody of...[police] less entitled to his care than a bale of goods or a dumb beast?

State of Indiana vs. Gobin, 94 F.48, 50 (7th Cir. 1899); Falkenstein vs. City of Bismark, supra at 792.

Furthermore,

> the suggestion that the law enforcement officers owe no general duty of care to those who have been arrested and incarcerated, but not convicted of of any crime, is contrary to sound public policy.

DeZort vs. Village of Hinsdale, 342 NE2d 468, (Ill.App. -1976); Falkenstein, supra at 792.

Besides the common law approach to this concept, it appears to have found its way into the United States Constitution, particularly through the Eighth Amendment (prohibiting cruel and unusual punishment) and Fourteenth Amendment (prohibiting

deprivation of life, liberty and property without due process).

Thus, it is clear that the City of Galveston and Putnal owed Gagne a duty to reasonably protect him (while in their custody) from himself and others. This duty clearly extends to self-destructive acts. Maricopa County vs. Cowart, 471 P2d 265 (Ariz. 1970); Thomas vs. Williams, 124 SE2d 409 (Ga.App. -1962); Kendrick vs. Adamson, 180 SE 645 (Ga.App. - 1935); DeZort vs. Village of Hinsdale, supra; Falkenstein, supra; Sudderth vs. White, 621 SW2d 33 (Ky.App. -1980); 79 ALR3d, supra at §3.

Based on the objective standard employed in Mitchell vs. Forsythe, supra and the duty of "safekeeping" of prisoners, it would constitute good and well recognized police practice to remove the belt of an intoxicated prisoner and one who is known to exhibit suicidal

tendencies, prior to placing that prisoner in a detention cell. Accordingly, Petitioners submit that "...the legal norms allegedly violated by the Respondent (duty of safekeeping and removal of the belt) were clearly established at the time of the challenged actions." Mitchell vs. Forsythe; supra, Harlow vs. Fitzgerald, supra.

IV.

Petitioners acknowledge the Supreme Court's view in connection with its recent decisions in Davidson vs. Cannon, 54 U.S.L.W. 4095 (U.S. Jan. 21, 1986) and Daniels vs. Williams, 54 U.S.L.W. 4090, (U.S. Jan. 21, 1986), which held that negligent conduct is not actionable as a denial of due process under 42 U.S.C.A. §1983. However, Petitioners would respectfully point out to this Court that the order of the District Court which was appealed to the 5th Circuit was dated

November 26, 1985. Furthermore, Petitioners' Second Amended Original Complaint, which is the subject of this appeal, was filed with the District Court on August 6, 1985. Petitioners submit that at the time of filing Petitioners' Second Amended Original Complaint and at the time of the District Court entering it's order heretofore mentioned, negligent conduct was actionable as a denial of due process under 42 U.S.C. §1983. Parratt vs. Taylor, 451 U.S. 527 (1981). Since both Davidson, supra, and Daniels, supra are companion cases and came out the week of January 21, 1986, Petitioners clearly pleaded facts and causes of action within the parameters of the law as it existed at that time. Parratt, supra. Respondent now seeks to use hind-sight as supporting authority for its position in this case. Accordingly, although Petitioners pleadings of negligence are no longer viable

under the state of the law, Petitioners intend, at first opportunity, to amend their complaint pursuant to the guidelines set out in Davidson, supra, and Daniels, supra.

However, Respondent Putnal has refused to acknowledge that Petitioners have pleaded more than mere negligence in its complaint. In this connection, Petitioners would submit that they have pleaded "gross-negligence" and "deliberate and conscious indifference" concerning the acts and omissions of Officer Putnal. In Texas, the standard for gross-negligence is set out in Burke Royalty Co. vs. Walls, 616 SW2d 911 (Tex. 1981). There the Court stated as follows:

> "The Plaintiff must show that the Defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the Plaintiff must show that the Defendant knew about the peril, but his acts or omissions demonstrated that he did not care..."

The District Court, in light of the facts as pleaded that Gagne was obviously intoxicated at the time of his arrest and booking, and that Gagne had attempted suicide on at least one prior occasion, the conclusion must be that such pleading was sufficient to pierce the qualified immunity defense as asserted by Officer Putnal.

V.

CONCLUSION

Petitioners' Second Amended Original Complaint must be viewed in light of the following two-pronged test:

> 1. Was Officer Putnal performing a discretionary function during the booking process in failing to remove Gagne's belt?
>
> 2. If Officer Putnal was performing a discretionary function during the booking process, did his conduct in failing to remove the belt violate clearly established rights under Harlow vs. Fitzgerald, supra?

The answer to the first question is clearly "No, Officer Putnal was not performing a discretionary function" at the time in question. He was merely charged with the responsibility of following an explicit rule of the Galveston Police Department. The answer to the second question, even in light of a negative answer to question number one, is clearly "Yes, Officer Putnal did violate Gagne's clearly established rights under the Constitution in failing to provide Gagne with safe custodial care".

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Petition be granted and the Fifth Circuit Opinion regarding these complaints be reversed and remanded with instructions.

Respectfully submitted,

BROWN, TODD, HAGOOD &
DAVENPORT

By: Ervin A. Apffel, III

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ATTORNEYS FOR
PETITIONERS

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Petitioners' Application for Writ of Certiorari was duly served upon all counsel of record by placing same in the United States mail, certified-mail, return receipt requested this 6th day of ~~April~~ May, 1987.

Ervin A. Apffel, III

ERVIN A. APFFEL, III

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

DONALD GAGNE)

VS.) C.A. G-84-192

CITY OF GALVESTON ET AL)

ORDER

Defendant Mike Putnal has moved for dismissal and for a stay of discovery. Defendant Mike Putnal asserts the defense of qualified immunity, alleging that his conduct did not violate the decedent's clearly established constitutional rights.

The Court has re-examined plaintiffs' complaint and the applicable law, and finds that the defense of qualified immunity has not application here. Plaintiffs complained that defendant Putnal arrested James Gagne and, contrary to common practice, failed to remove

Gagne's belt before placing Gagne in a cell. Gagne hanged himself with the belt which Officer Putnal failed to remove. It is evident from the facts pleaded that Putnal's alleged conduct constitutes "negligence" or, at best, "gross negligence" which amounts to deliberate indifference.

"Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences," Harlow v. Fitzegerald, 457 U.S. 800, 819 (1982). Consequently, "government officials performing discretionary functions generally are shielded from liability for constitutional damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known," Harlow, Id. at 818.

The Court realizes that plaintiffs' amendment does little to improve their pleading, and that the law on jail suicide is uncertain in this circuit. The extent to which the Eighth Amendment standard applicable to convicted prisoners could be extended to pretrial-detainees in the context of jail suicide has yet been determined by the Fifth Circuit. See Partridge v. Two Unknown Police Officers, 751 F.2d 1448 (5th Cir. 1985), opinion withdrawn, 755 F.2d 1126. Assuming that Gagne's constitutional rights have been violated, this Court is not prepared to say that Officer Putnals' conduct constitutes an exercise of discretion protected by the judge-made doctrine of qualified immunity. Harlow teaches that officials performing discretionary functions are excepted from liability,

Mitchell v. Forsyth, 53 U.S.L.W. 4798, 4804 (June 19, 1985); defendant Putnal's conduct, as pleaded, does not seem to fit that exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that defendant Putnal's motion to stay discovery and motion to dismiss based on qualified immunity be, and are hereby, DENIED.

DONE at Galveston, Texas, this the 26th day of November, 1985.

H. Gibson
UNITED STATES DISTRICT JUDGE

APPENDIX B

Donald GAGNE, etc., et al.,
Plaintiffs-Appellees,

v.

CITY OF GALVESTON, et al,
Defendants,

and

Mike Putnal, Defendant-Appellant.

No. 85-2883.

United States Court of Appeals,
Fifth Circuit.

Dec. 9, 1986.

Plaintiffs brought §1983 action against arresting officer for damages for prisoner's suicide. The United States District Court for the Southern District of Texas, Hugh Gibson, J., denied officer's motion to dismiss, and officer appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that officer was entitled to defense of qualified immunity.

Reversed.

Wisdom, Circuit Judge, filed dissenting opinion.

1. **Civil Rights** 13.8(4)

Police officers are entitled to assert defense of qualified immunity for all acts and omissions that occur in course of their official duties.

2. **Civil Rights** 13.8(4)

Arresting officer was not under clearly established constitutional duty to discovery prisoner's suicidal tendencies or to deprive him of means of killing himself, and therefore was entitled to qualified immunity from liability for death of prisoner who used his belt to hang himself. 42 U.S.C.A. §1983.

3. **Civil Rights** 13.8(4)

Police officer's violation of department regulation providing "Belts must be removed from prisoner's clothing and placed in the property bag" could not

by itself deprive officer of protection of qualified immunity from liability for suicide of prisoner who hung himself with his belt. 42 U.S.C.A. §1983.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

[1.2] Police Officers are entitled to assert the defense of qualified immunity for all acts and omissions that occur in the course of their official duties. In this case, which arose from a jail suicide on May 17, 1983, we hold that the arresting officer was not under a clearly established constitutional duty to discover the prisoner's suicidal tendencies or to deprive him of the means

of killing himself. Accordingly, the §1983 action against the officer must be dismissed.

I

According to the complaint in this civil rights action, Officer Mike Putnal and another Galveston policeman arrested James Gagne on May 17, 983, for public intoxication, took him to jail, and booked him. Gagne had scars on one wrist from a prior suicide attempt. Although there was a police department rule or policy requiring that belts be removed from all prisoners during the booking process, Putnal neither removed Gagne's belt nor conducted an investigation that might have uncovered the prisoner's suicidal tendencies. While alone in a cell that night, Gagne used the belt to hang himself. Gagne's estate and survivors sued Putnal and others under 42 U.S.C. §1983 for having failed to prevent the suicide.

After a number of procedural preliminaries, Putnal filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). The district court denied the motion. Noting that the law on jail suicide is uncertain in this circuit, the district judge thought that the decedent's constitutional rights might have been violated. Proceeding on that assumption, he stated that he was "not prepared to say that Officer Putnal's conduct constitute[d] an exercise of discretion protected by the judge-made doctrine of qualified immunity." Putnal appeals.[1]

[1]The district court's denial of Putnal's 12(b)(6) motion was an appealable final decision within the meaning of 28 U.S.C. §1291.

See Mitchell v. Forsyth -- U.S. ____, 105 S.Ct. 2806, 2815-17, 86 L.Ed2d 411 (1985).

II

As a police officer, Putnal is entitled to assert the qualified immunity defense. Saldana v. Garza, 684 F.2d 1159, 1162, 1163 n. 12 (5th Cir.1982). Under Elliot v. Perez, 751 F.2d 1472, 1473 (5th Cir.1985), an eligible defendant's Rule 12(b)(6) motion must be granted unless the plaintiff's complaint states "with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." In order to survive a Rule 12(b)(6) motion, the plaintiff must allege a violation of some federal right that was clearly established at the time of the events in question. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396(1982).

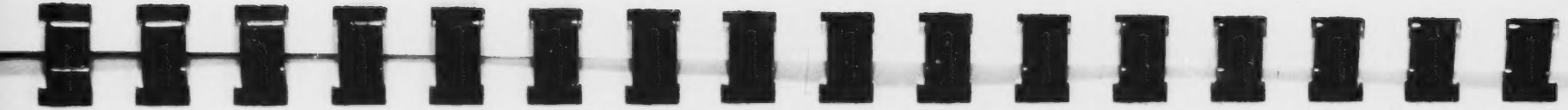
[3] The plaintiffs argue that Putnal is not entitled to qualified immunity because he was not engaged in a

"discretionary act." To support this argument, they contend that there was an unambiguous police department regulation saying. "Belts must be removed from prisoner's clothing and placed in the property bag." The Supreme Court, however, has held that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provisions." Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 3030, 82 L.Ed.2d 139 (1984) (footnote omitted). Accordingly, the violation of such a departmental regulation could not by itself deprive Putnal of the protection of qualified immunity.

Relying on language in a number of Supreme Court opinions, e.g. Davis v. Scherer, 105 S.Ct. at 3021; Scheuer v. Rhodes, 416 U.S. 232, 246, 94 S.Ct. 1683, 1691, 40 L.Ed.2d 90 (1974), the plaintiffs

contend that the doctrine of qualified immunity applies only when an official acts in "an atmosphere of confusion, ambiguity, and swiftly moving events." Although the Supreme Court's qualified-immunity opinions have given special attention to the need to avoid inhibiting the ardor of public officials whose positions entail the exercise of discretionary authority, the Court has never implied that the immunity defense is lost when an official is engaged in routine tasks. Indeed, any such suggestion was firmly rejected in footnote 14 of Davis v. Scherer, where the Court emphasized that the so-called "ministerial duty" exception to qualified immunity is extremely narrow in scope. 105 S.Ct. at 3021 n. 14. First, "[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority."

Id. (emphasis added) (citation omitted). Thus, if an official is required to exercise his judgment, even if rarely or to a small degree, the Court would apparently not find the official's duty to be ministerial in nature. Second, and perhaps more important, the Davis Court stressed that the breach of a ministerial duty "would forfeit official immunity only if that breach itself gave rise to the ... cause of action for damages ... [so that the plaintiff] is entitled to damages simply because the regulation was violated." Id.(emphasis added) (citation omitted). In making this point, the Court referred to footnote 12 of the same opinion, where it was said that "[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation--of federal or of state law--unless that statute or regulation provides the basis for the cause of



action sued upon." Id. at 3020 n. 12(emphasis added). Thus allegations about the breach of a statute or regulation are simply irrelevant to the question of an official's eligibility for qualified immunity in a suit over the deprivation of a constitutional right. This question must be answered solely by an inquiry into whether the constitutional right at issue was clearly established at the time of the events in question.

The only factual allegations against Putnal that are remotely relevant to the claimed deprivation of constitutional rights are that Putnal failed to remove the decedent's belt and that the decedent was not placed under "heightened surveillance" at the jail. The plaintiffs have not cited any case suggesting that a constitutional duty to protect prisoners from self-destructive behavior was clearly established at the time Gagne was arrested.

Indeed, the case of Partridge v. Two Unknown Police Officers, 791 F.2d 1182 (5th Cir.1986), shows that the possible existence and scope of such a duty has only very recently begun to attract attention in this circuit. Thus, under Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed2d 396 (1982), and Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir.1985), the claim against Putnal must be dismissed.[2]

REVERSED

[2]Judge Wisdom's dissent, able as always, misconceives our holding. The question is whether a rule of constitutional law, imposing a duty upon jailers to identify and protect suicidal persons from themselves, was so well-established when James Gagne died as to deny the arresting officer's qualified immunity from damages for his death. The answer to that question is plainly "no" unless the

violation of a jail rule changes that result. The dissent does not directly attack the primary issue of whether such a constitutionally imposed duty existed, but uses a jail regulation to supply certainty to an uncertain rule of constitutional law. The perverse consequences of attaching constitutional liability to such efforts at self-regulation when no constitutional duty was otherwise clearly established are self-evident. And more to the point for this inferior court, it is not what the Supreme Court has elected to do. Judicial notions of liberty interest may so evolve as to create a clear constitutional standard. But until then, the defense of qualified immunity remains available.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

The decision of the majority goes too far in protecting police officers who fail

to take reasonable precautions to protect detainees.

The poor guy who hanged himself by his belt had been arrested for drunkenness and trespassing. To the police on duty he must have been just another drunk. The Galveston Police Department, however, has a rule requiring that belts be removed from prisoners during the booking process. This is not an unusual rule. Police departments throughout the county have had the same rule for years. The rule comes from a recognition of the facts of life. It is well known that detainees and other prisoners have suicidal tendencies and must be protected against themselves. To speak of this rule as "discretionary" is to ignore the realities of jailing.

In Davis v. Scherer, the Supreme Court did say that "officials" ... do not lose their immunity because their conduct violates some statutory or administrative

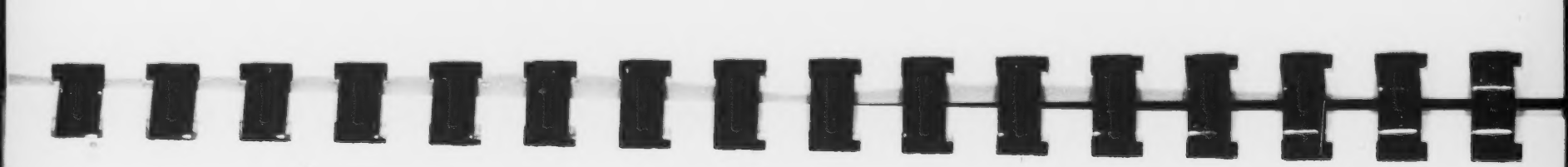
provisions." But the Supreme Court was not talking about something as fundamental to jail supervision and the protection of life as the universal practice of removing a detainee's belt. The Supreme Court in Davis v. Scherer dealt with termination of a plaintiff's employment in violation of a state highway patrol regulation requiring an investigation before terminating an employee. Here, the police officer's violation of the unambiguous, mandatory rule of removing a detainee's belt amounted to callous indifference to life.

If this decision stands, it means that no matter how egregiously a police officer ignores or defies a clear, no-exceptions rule, this Court of Appeals will shield him. No matter how negligent, no matter how callously indifferent to proper police conduct a police officer's omissions or commissions may be, this

Court will protect him by uttering the magical word "discretionary."

I believe that Congress did not write section 1983 to permit the result the majority reaches in this case. To affirm the dismissal of this case under Rule 120(b)(6) makes it worse.

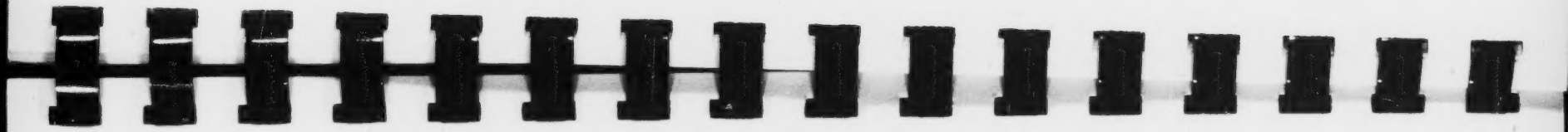
This case cries for a trial.



APPENDIX C

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



APPENDIX D

UNITED STATES CONSTITUTION
EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX E

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.